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No. _____

Supreme Court U.S.
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In The

Supreme Court of the United States

October Term, 1993

MICHAEL P. MARVICH,

Claimant-Petitioner,

and

REAL PROPERTY LOCATED AT
2695 Canary Drive, Costa Mesa, California

Defendant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether, in a federal forfeiture of a home case, the homeowner and occupant thereof ever loses standing to object to an illegal entry and search of the home within the meaning of *Rakas v. Illinois*, (1978) 439 U.S. 128?

2. Whether the U.S. Ninth Circuit Court of Appeals was correct in ruling that claimant, the home owner and occupant of his own home, had no standing to object to warrantiess illegal entry and search of his own home under the Fourth Amendment and *Rakas v. Illinois*, (1978) 439 U.S. 128?

3. Whether, in a warrantless entry of a domicile, the government must carry the burden to show that police officers validly entered the home under some recognized exception to the warrant clause of the 4th Amendment to the U.S. Constitution, and not shift that burden to the homeowner occupant of that private dwelling?

4. Whether the government can rely on the asserted reason for the warrant exception that police entered claimant's home to affect the arrest of a California parolee who was not then, and had never been, on parole?

5. Whether, when claimant-petitioner asserts this defect, can the U.S. 9th Circuit foreclose the opportunity of proving the illegal entry by claimant-petitioner by asserting that claimant-petitioner has no "standing" to assert 4th Amendment rights of the parolee?

Questions Presented – Continued

6. Whether, when state officers set forth sworn statements under oath in a search warrant affidavit concerning their inability to detect odors of marijuana before warrantless entry into private bedrooms in a private home, is it a violation of the rules of *Napue v. Illinois*, 360 U.S. 264, 269, *Miller v. Pate*, 386 U.S. 1, and related authorities for a federal-state prosecutor to structure contrary direct testimony affidavits, requesting their signature thereto, stating the false and opposite fact that they detected such odors in the hallway of the home, prior to entry, in an effort to gain warrantless entry into the private bedrooms?

7. Whether the excessive fines-proportionality decision *Austin v. United States*, 509 U.S. ___, 125 L.Ed.2d 488, 113 S.Ct. 2801 (6-28-93) should be given full retroactivity to all federal forfeiture cases not final on the date of its rendition, within the meaning of the "finality rule" of *Linkletter v. Walker* 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731 (1965)?

8. Whether a non-published memorandum ruling of a U.S. Circuit Court is foreclosed from attack for errors therein by another federal litigant in a totally unrelated federal home forfeiture case, and whether a different panel of a U.S. Circuit Court is foreclosed from reconsidering errors in that non-published memorandum, thus depriving the claimant in a federal home forfeiture case of his defense to the forfeiture?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Michael Patrick Marvich, petitioner, seeks a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from the memorandum filed April 13, 1993,

rehearing and suggestion for rehearing en banc denied June 24, 1993.

OPINION BELOW

The United States court of Appeals for the Ninth Circuit filed its unpublished *Memorandum* on April 13, 1993. This appears as Appendix "A" to this petition.

On June 14, 1993 the U.S. Ninth Circuit denied a petition for rehearing and suggestion for rehearing en banc. A copy of that order appears as Appendix "B" to this petition.

JURISDICTIONAL GROUNDS

(i) The United States Court of Appeals for the Ninth Circuit affirmed the forfeiture of petitioner's home to the United States by an unpublished *Memorandum* filed April 13, 1993. A copy of that memorandum appears as Appendix A-1.

(ii) The U.S. Ninth Circuit denied a petition for Rehearing /Suggestion for Rehearing En Banc on June 24, 1993. A copy of that Order appears at Appendix B-1.

(iii) Jurisdiction to review by Certiorari a decision of a United States Circuit Court in a civil case is provided under 28 U.S.C. 1254(1).

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Claimant Michael P. Marvich, now 78 years of age, owned and occupied his own home at 2695 Canary Drive, Costa Mesa, California. He had as a room renter/house guest one Collin Lee Quick, a former state prison inmate, who was asserted to be "an at large" parolee of the State of California.

In fact, and under the law of California, Quick was not a parolee of the State of California.

Under an alleged arrest warrant for Quick, as a parole violator, California state officers forcibly entered claimant's home on or about January 25, 1990 without a search warrant and arrested Quick.

They searched claimant's entire home, finding controlled substances, within some bedrooms, and within the closets or attic spaces, in, and connected to, these bedrooms. Based on the locating of controlled substances within claimant's home, claimant's home was forfeited to the United States by the U.S. District Court for the Central District of California. The home was worth some $375,000 and was forfeited without an excessive fine-proportionality analysis provided for by *Austin v. United States*, 509 U.S ___, 125 L.Ed.2d 448, 113 S.Ct. 2801 (June 28, 1993).

The forfeiture was affirmed on April 13, 1993 in a nonpublished opinion of the U.S. Ninth Circuit (Appendix A to this petition) without allowing oral argument although it was demanded/requested by claimant.

Claimant sought rehearing/En Banc review which was denied on June 24, 1993 (Appendix B to this petition).

The United States Court of Appeals for the Ninth Circuit ruled that claimant had no standing to object to the warrantless search of his own home in which he lived, and that the house guest, Collin Lee Quick, even though wrongly arrested as a "parole violator" within claimant's home (Quick was not then validly on state parole, nor had he been validly on state parole since his release from a California prison after serving his entire sentence), could not be used by claimant to show illegal entry into the home without a search warrant because claimant "had no standing to complain of Quick's Fourth Amendment rights" pursuant to *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978), since "Fourth Amendment rights are personal and may not be asserted vicariously."

The U.S. 9th Circuit thus diverted analysis from claimant's personal 4th Amendment rights to be free of warrantless illegal and unreasonable searches and seizures in his own home, to which he obviously has standing, to a focus on whether the illegality of Quick's arrest within the domicile could be taken advantage of by claimant, while, in parallel, asserting that claimant had no "standing" to assert Quick's 4th Amendment violations. The government had no other assertedly valid reason to effect warrantless entry into claimant's home.

Claimant asserts that key and critical nationally consequential issues on "standing" have been misunderstood by the Circuit, and have been used to disallow claimant's challenge to the entry of his own home and searches

therein. Secondly, claimant asserts that prosecutors in this forfeiture case willfully structured perjury by authoring direct evidence testimony for police officers by falsifying affidavits that directly contradicted their original sworn affidavits used to secure a belated search warrant after they had effected the initial illegal and warrantless entry into the home, all in violation of *Napue v. Illinois*, 360 U.S. 264, 269 and *Miller v. Pate*, 386 U.S. 1, and in violation of the rule against use of false testimony in federal trials under the supervisory role of this Honorable Court over the lower federal courts in *Mesarosh v. United States*, 352 U.S. 1, 1 L.Ed.2d 1, 77 S.Ct. 1. Finally, claimant asserts that he is entitled to have the excessive fine-proportionality concepts of *Austin v. United States*, 509 U.S. ___, 125 L.Ed.2d 488, 113 S.Ct. 2801 (June 28, 1993) to be applied to his home forfeiture, not yet final since it is still alive on Petition for Certiorari, and that the case be remanded to the District Court, to require the excessive fine-proportionality analysis to be applied.

Petitioner-claimant asserts that *Austin v. United States*, supra, should be retroactively applied to all forfeitures of property not final on appeal.

REASONS FOR GRANTING CERTIORARI

1. To resolve the key national issue whether a domestic homeowner and occupant of the home ever loses standing to object to illegal entry, search, and seizures in the home where said 4th Amendment violations are used to support a federal judgment of forfeiture of the home pursuant to 21 U.S.C. 881(a)(1)?

2. To resolve whether, for federal property forfeitures, in a warrantless entry, search, and seizure occurring in a home, the burden ever shifts away from the state or federal government to justify the violations under an exception to the warrant clause of the 4th Amendment to the U.S. Constitution?

3. To resolve whether, if the warrantless home entry cannot be justified because of, inter alia, an illegal parole arrest is made of a former California prisoner then not on state parole, in the home, can the claimant-homeowner's efforts to halt forfeiture of his home be denied because of an asserted "lack of standing" in the homeowner to assert "Fourth Amendment violations" of the arrestee?

4. To resolve whether a federal prosecutor and searching/entering police can alter and restructure sworn affidavits to falsify reasons for entering private bedrooms in the home, within the meaning of *Napue v. Illinois*, 360 U.S. 264, 269 and *Miller v. Pate*, 386 U.S. 1?

5. To resolve whether the forfeiture of a $375,000 California fully-owned dwelling because of a relatively small amount of drug contraband has been brought into it by a room renter in the home constitutes an excessive fine with the provisions of the 8th Amendment as enunciated in *Austin v. United States*, 509 U.S. ___, 125 L.Ed.2d 488, 113 S.Ct. 2801 (6-28-93)?

6. To resolve whether the provisions of *Austin v. United States*, 509 U.S. ___, 125 L.Ed.2d 488, 113 S.Ct. 2801 (6-28-93) shall be applied retroactively to all federal forfeiture cases not yet final on the date of rendition of Austin, within the guidelines of "finality" set forth in

Linkletter v. Walker, 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731 (1965)?

7. To resolve whether a non-published memorandum ruling of a U.S. Circuit Court is foreclosed from attack for errors therein by another federal litigant in a totally unrelated federal home forfeiture case, and whether a different panel of a U.S. Circuit Court is foreclosed from reconsidering errors in that non-published memorandum, thus depriving the claimant in a federal home forfeiture case of his defense to the forfeiture?

ARGUMENT I

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO RESOLVE, IN FEDERAL CASES, WHETHER A HOMEOWNER AND OCCUPANT THEREOF, EVER LOSES STANDING TO OBJECT TO UNREASONABLE AND WARRANTLESS ENTRY, SEARCH AND SEIZURE IN THE HOME, AND WHETHER THE BURDEN TO ESTABLISH ANY EXCEPTION TO THE WARRANT CLAUSE IS EVER TAKEN AWAY FROM THE GOVERNMENT. IN PARALLEL, CAN A FEDERAL CIRCUIT COURT RULE THAT "LACK OF STANDING" IN THE HOMEOWNER TO ASSERT 4TH AMENDMENT VIOLATIONS IN AN ARRESTEE TAKEN INTO CUSTODY IN THE HOME PRECLUDES THE OWNER AND OCCUPANT OF THE HOME FROM DEMONSTRATING THAT THE STATE/GOVERNMENT HAS NOT CARRIED ITS BURDEN TO PROVE AN EXCEPTION TO THE WARRANT CLAUSE, WITHIN THE MEANING OF *RAKAS V. ILLINOIS,* 439 U.S. 128 (1978)?

In 1990, Claimant and petitioner Michael Marvich rented a room in his home to an ex-felon and inmate of a

California prison, one Collin Lee Quick. In 1983, in California state court, Quick had negotiated a plea of guilty to a drug felony for a 3 year prison term with the added proviso that he would not be placed on parole after fully serving that term.

California law provides that all state prison terms are to be fully served before release as a combination of actual custodial time and "good-time-work-time" which adds up to the total imposed prison sentence.

Generally said, California prison inmates receive one day of "good-time-work-time" for every day of actual custody and earn this by good behavior and work assignments while in prison.

This means that, as here applied to Collin Lee Quick, Quick could fully complete a 3 year state prison sentence in 18 months of actual custody, because the other 18 months are credited as "good-time-work-time".

Should a special parole be added to the sentence, the inmate would be paroled to commence that special parole. Where, as here, Collin Lee Quick negotiated a plea bargain for *no parole,* Quick was released free and clear of parole supervision after completing the full 3 year sentence as 18 months actual custody plus 18 months "good-time-work-time".

Quick was thus released from California State prison with no tethers and fetters and constraints.

He was not, and could never be, a parolee under this sentence.

In an ancillary and subsequent federal criminal matter, in the Central District of California, United States

District Judge James M. Ideman ruled that Collin Lee Quick was never under the parole supervision of the State of California, and could not be subject to arrest as a parolee or as a "parole violator," or as a "parolee at large."

This was specifically because of the fact that no special parole had been added to Quick's 3 year prison sentence, and that the service of this sentence was fully completed upon Quick's release from prison. See Appendix C to this petition.

On appeal to the U.S. 9th Circuit from this ruling, a panel of that Court agreed with Judge Ideman that Quick was not subject to the special parole, but incorrectly ruled in an erroneous interpretation of state penal law that Quick had been "paroled" to serve the "final 18 months" of the 3 year sentence after serving the initial 18 months in custody. That ruling was erroneous and this issue was never even briefed by the parties United States and Collin Quick; it was a gratuitous and erroneous interpretation of California state parole law and penal code sanctions. See pages C-3, C-4, Appendix C.

The State of California, acting via its parole forces, illegally caused Collin Lee Quick's arrest as a "parole violator" and a "parolee at large" when Quick was, on January 25, 1990, discovered to be renting a room in the defendant domicile at 2695 Canary Drive, Costa Mesa, owned and occupied at all times by petitioner-claimant Michael Marvich, a 78 year old man infirm in his health, and thereafter searched, without probable cause, into all closed-door bedrooms of the home.

Within Quick's rented bedroom, and within another bedroom of the home, parole agents and sheriff's deputies located and seized marijuana and methamphetamine kept clandestinely by Collin Lee Quick without claimant's knowledge.

Based on the locating of these controlled substance materials in the home, the instant federal forfeiture proceeding was undertaken, and the home, of value of some $375,000, was ordered forfeited to the United States.

On appeal from the forfeiture, petitioner-claimant Marvich raised the warrantless entry, search, and seizure of, and in, his own home as a violation of his rights under the 4th Amendment to the U.S. Constitution, and urged that the United States carried the burden of showing that some exception to the warrant clause of the 4th Amendment justified the warrantless entry into his home.

The United States asserted that, arguendo, even though the arrest of Quick as a "parolee at large" in the home, was arguendo, illegal, since Quick was not even validly on parole, claimant Marvich had "no standing" to assert illegal deprivations of Quick's 4th Amendment rights, since these were "personal rights" under *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978).

The U.S. 9th Circuit, giving credence to this contention, thus diverted the attack on the illegal entry of the home, and its search and seizures, to which claimant-petitioner obviously had "standing", to the contention that petitioner could not assert that the government had no valid grounds to enter the home because claimant could not assert illegality in Quick's 4th Amendment

rights, because claimant-petitioner had no "standing" to do this.

This questionable and illogical Circuit Court "analysis" thus foreclosed petitioner from asserting the true reason that the home entry was illegal, and removed from the United States its obligation to demonstrate that the warrantless entry was valid under some exception to the warrant clause.

It is important to recognize that the 9th Circuit Court of Appeals did not overtly adjudicate that Quick was or was not validly on parole, even though petitioner and claimant properly briefed this subject and showed error in the U.S. Circuit Court opinion, *U.S.A. v. Collin Lee Quick*, No. 88-5166; the Circuit Court in this appeal circumvented the problem by its erroneous assertion that claimant and petitioner simply had "no standing" to assert violations of Quick's Fourth Amendment Rights, thus ignoring that the government had not demonstrated any valid exception to the warrant clause to otherwise enter this home.

It is clear that *Rakas v. Illinois*, supra, does not apply to deny standing to the *home owner* and *home occupier* to object to illegal entry, search, and seizures in that owner's home; indeed, Rakas and other like cases merely assert no "standing" in the passenger in an automobile owned by another where the passenger asserted no ownership in either the vehicle or items seized from the vehicle. The obvious and monumental difference in Rakas v. the situation at bar is that Rakas owned, or asserted dominion or control over, *none* of the property involved, while at bar petitioner owned and lived in the premises in question.

See also *Rawlings v. Kentucky*, 448 U.S. 98, 65 L.Ed.2d 633, 100 S.Ct. 2556 where this Honorable Court held that a male had no reasonable expectation of privacy, and thus no "standing", to assert 4th Amendment violations, in the search of his girl friend's purse; and see *United States v. Salvucci*, 448 U.S. 83, 65 L.Ed.2d 619, 100 S.Ct. 2547.

Stripped to its essentials, and the superficial veneer removed, petitioner asserts that the Court of Appeals for the Ninth Circuit has misconstrued the concept of "standing," effectively ruling that a homeowner and occupier of that home does not have "standing" to object to warrantless and illegal entries into that home where wholesale and manifold searches are carried out, and that Court shifts focus on this key issue to the question whether petitioner has "standing" to assert 4th Amendment violations in the rights of the room renter, Collin Lee Quick. That Court cites *Rakas v. Illinois*, supra, for this proposition, and it must be obvious that Rakas is here inapplicable at the threshold.

Certiorari should thus be granted to further elucidate this key national and recurring issue.

In summary, petitioner asserts the following:

(1) As a homeowner and occupier of his own home, he always has 4th Amendment "standing" to object to forcible, warrantless entries and searches and seizures which have occurred in his home;

(2) The entry being without search warrant, the burden remains with the government or state to demonstrate an exception to the warrant clause;

(3) If the state or government cannot carry that burden, surely the aggrieved homeowner and home occupier is not deprived of asserting that the state or government has failed to do so, and it is illogical, and an intellectual non sequitur, to rule that "lack of standing" in the homeowner deprives the victim homeowner from demonstrating that the state or government has not carried their burden, which never leaves them, in a warrantless forcible entry into a protected domicile.

This the U.S. Court of Appeals for the Ninth Circuit has done without reaching the issue of whether the room renter, Collin Lee Quick, was even at that time, a California State Parolee.

It must be noted, in passing, that an error in interpreting California Penal Code/Parole/Sentencing law in a non-published opinion can not be cited by the federal Court of Appeal, or any other Court, as law that binds some other litigant in a different case, here the forfeiture of the petitioner's home. See footnote, page C-1, Appendix C to this petition.

At bar, the 9th Circuit panel confesses inability to reconsider an assertedly erroneous and gratuitous interpretation of the California Determinant Sentencing Law. The U.S. 9th Circuit panel and the instant U.S. District Court cut off and foreclosed any effort by this petitioner to show error in a non-published U.S. 9th Circuit memorandum opinion. This error illegally foreclosed petitioner from showing Collin Lee Quick was then not a California parolee, was not a "parolee at large", and was not subject to an illegal arrest in a forced warrantless entry of petitioner's home.

The memorandum non-published opinion *U.S.A. v. Quick*, No. 88-5166 is attached to this petition as Appendix C.

In view of the above key nationally consequential issues, Certiorari should be granted.

ARGUMENT II

CERTIORARI SHOULD BE GRANTED TO NULLIFY A JUDGMENT OF FORFEITURE WHERE THE POLICE AND PROSECUTOR CRIMINALLY CONSPIRE IN THE PRESENTATION OF PERJURED TESTIMONY IN ANY FEDERAL FORFEITURE TRIAL.

After the police had illegally entered claimant's home to allegedly effect an arrest of Collin Lee Quick as a California "parolee at large", they immediately arrested Quick, and thereafter roamed about the living room, kitchen, and hallway areas of the home.

They then made warrantless entry into all of the bedrooms of the home which had the doors closed, although their sole reason for entry, Quick's arrest, had then been accomplished.

In 2 of the bedrooms they located some marijuana which they stated that they could not detect the odor thereof until after first entering these bedrooms, and thence entering the closet or a crawl space in the attic. They did not detect any such odor prior to the warrantless entry into the private bedrooms which had the doors closed. They so stated in their police reports, and also so stated, under oath, in a subsequent effort to obtain a

search warrant to seize from the home the materials that they had already located.

At this time, of course, they had not consulted with federal prosecutors who eventually prepared the case for trial at the forfeiture of the home proceeding.

Recognizing that they could not justify the warrantless entry and search into the private bedrooms of petitioner-claimant's home, since their mission had been accomplished by the arrest of Collin Lee Quick in the living room of the home, federal prosecutors re-did the original affidavits in their new capacity of direct evidence sworn declarations to now assert that the affiant could smell the odor of marijuana in the hallway outside the bedroom.

This willful falsification of the sworn affidavit in support of the search warrant was used to falsely support the warrantless entry of the police into the bedrooms *after* Quick, the asserted "parolee at large", had been arrested in the living room. Thus it was demonstrated in this forfeiture Trial Court that the federal prosecutor conspired with the police in preparing false affidavits, as direct evidence at the forfeiture trial, in the presentation of perjured testimony that they detected the odor of marijuana in the hallway before entering the bedroom and discovering marijuana in the closet, to show that petitioner and a male and female living at the home had knowledge of its presence.

The U.S. Court of Appeals does not deny that the perjured evidence was used at the trial, but merely held that the trial court had the right to determine "which version" of the testimony was true; see Appendix A. Such

a simplified analysis should not apply to key and critical directly conflicting sworn statements by prosecution witnesses because it is evident that one of the versions presented by the government witnesses is, per se, perjury.

It has been consistently held by this Honorable Court that use of perjured testimony at the trial by the prosecution requires reversal of the judgment in the following cases: *Mooney v. Holohan,* 294 U.S. 103; *Mesarosh v. United States,* 352 U.S. 1, 1 L.Ed.2d 1, 77 S.Ct. 1, the latter holding that this Honorable U.S. Supreme Court will not condone false evidence in federal trials in its "supervisory role" over the lower federal courts; See also *Alcorta v. Texas,* 355 U.S. 28; *Miller v. Pate,* 386 U.S. 1, *Giglio v. United States,* 405 U.S. 150; *DeMarco v. United States,* 415 U.S. 449; *Imbler v. Craven,* 298 F.Supp. 795 (C.D. Calif. 1969) and cases cited.

The willful use of perjury.and false evidence by the government in order to prevail in a case in which it is a litigant denies due process of law and must cause reversal of the judgment rendered in its favor. *Napue v. Illinois,* 360 U.S. 264, 269; *Imbler v. Craven,* 298 F.Supp. 795 (C.D. Calif. 1969) affirmed by the U.S. 9th Circuit, Cert. Den. by the Supreme Court of the United States.

WHEREFORE, it is respectfully prayed that this Honorable court grant Certiorari to resolve whether prosecutorial structured perjury will be allowed to support forfeiture of property in federal forfeiture trials.

ARGUMENT III

WITHIN THE MEANING OF *LINKLETTER V. WALKER*, 381 U.S. 618, 14 L.ED.2D 601, 85 S.CT. 1731 (1965) THE VALIDITY OF THE JUDGMENT OF FORFEITURE OF PETITIONER'S VALUABLE HOME IS NOT FINAL; THE EXCESSIVE FINES-PROPORTIONALITY ANALYSIS OF *AUSTIN V. UNITED STATES*, 509 U.S. ___, 125 L.ED.2D 488, 506, 113 S.CT. 2801 (JUNE 28, 1993) SHOULD BE RETROACTIVELY APPLIED TO ALL FEDERAL FORFEITURE CASES NOT FINAL UPON THE DATE OF DECISION OF *AUSTIN*; REMAND SHOULD BE MADE TO THE U.S. DISTRICT COURT TO CONSIDER WHAT FACTORS SHOULD INFORM WHETHER A FINE SUCH AS THIS IS EXCESSIVE AND WHETHER THIS $375,000 HOME FORFEITURE EXACTS TOO SEVERE A CRIMINAL-CIVIL PENALTY. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE ISSUE OF RETROACTIVITY OF *AUSTIN V. UNITED STATES*.

In considering whether the exclusionary principle enunciated in *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961) applied to state convictions which had become final before rendition of the *Mapp* opinion, this Honorable Court stated in *Linkletter v. Walker*, 381 U.S. 618, 622, fn.5, 14 L.Ed.2d 601, 604, fn.5, 85 S.Ct. 1731:

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for certiorari had elapsed before our decision in *Mapp v. Ohio*."

Petitioner, a 78 year old man in infirm health, stands to lose his $375,000 home to the government because relatively small quantities of controlled substances were found therein.

After claimant-petitioner's appellate decision on April 13, 1993 and denial of rehearing on June 24, 1993, this Honorable Court decided, a mere 4 days later, *Austin v. United States*, 509 U.S. ___, 125 L.Ed.2d 488, 113 S.Ct. 2801 (6-28-93) which held that forfeitures of real and personal property to the United States may constitute excessive fines under the Eighth Amendment to the United States Constitution, and that the lower courts are to consider what factors should inform such a decision in the first instance. See V, 509 U.S. ___, ___, 125 L.Ed.2d 488, 506, 113 S.Ct. 2801, 2812.

Petitioner-claimant's valuable $375,000 home forfeiture case is not "final" within the reasoning of this court's "finality" concept in *Linkletter v. Walker*, supra, and petitioner urges this Honorable Court to give full retroactivity to the *Austin v. United States* decision to all forfeiture cases not final as of June 28, 1993.

Petitioner has timely petitioned for Writ of Certiorari to this Court, and could not have had the advantage of *Austin* since the law was otherwise when his trial and appeal occurred, i.e., the authority of *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974).

Certiorari is thus prayed for to resolve the issue whether *Austin v. United States*, supra, is to be given retroactivity to all federal forfeiture cases not final as of June 28, 1993.

ARGUMENT IV

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE KEY ISSUE WHETHER AN UNPUBLISHED MEMORANDUM OF A FEDERAL CIRCUIT COURT THAT IS ASSERTED TO HAVE BEEN ERRONEOUSLY RESOLVED ON A NON-BRIEFED ISSUE OF STATE LAW IS FOREVER INSULATED FROM ATTACK BY ANOTHER FEDERAL LITIGANT, AND MOREOVER, IS ASSERTEDLY INSULATED FROM RECONSIDERATION FOR ERROR BY ANOTHER PANEL OF THAT FEDERAL CIRCUIT IN A SUBSEQUENT FEDERAL HOME FORFEITURE CASE.

At bar, petitioner Michael Marvich asserted that Collin Lee Quick, the renter of a room at the defendant property, at 2695 Canary Drive, Costa Mesa, California, was not on parole, was not a parolee, and was not a "parolee at large" subject to arrest by California parole authorities.

Petitioner asserted that a prior U.S. District Judge, the Honorable James M. Ideman, had ruled in a previous ancillary case, *U.S.A. v. Quick,* that Quick was never on state parole because he had fully served a 3 year California prison sentence as a summation of some 18 months actual custody and some 18 months "good-time work-time," and that the state court had never placed Quick on a subsequent to release "parole tail" which is required by California law in order to maintain a parole over a California felon.

The United States of America appealed this ruling to the U.S. 9th Circuit, resulting in the unpublished *Memorandum, U.S. v. Quick,* No. 88-5166, appearing as Appendix C to this petition.

That Court agreed with the District Judge that Quick could not be maintained on the "parole tail" since it had never been imposed on him. (Section A, Appendix C). However, although never raised in any of the briefs by either side to that appeal, the panel of the U.S. 9th Circuit gratuitously undertook to interpret the California Determinant Sentencing Law to mean that the 3 year imposed California sentence was *not* fully served prior to release, and that there would be, and was, no "good-time work-time" credit; thus, said the Ninth Circuit panel, the service of the some 18 months in custody by Quick and his release thereafter was to a "parole" for the balance of the 3 year sentence. (Section B, pages C-3, C-4, Appendix C).

Such is gross error in interpretation of the California Determinant Sentencing Law by the 9th Circuit panel, and the fact was the government, who appealed the District Court's ruling, never so asserted in its briefs, nor did Quick respond to such allegation.

Simply said, the Quick memorandum is an erroneous resolution of the California Determinant Sentencing Law and Collin Quick's parole status, and the question is whether petitioner Marvich is forever insulated from attacking the validity of that memorandum where, as here, it affects the validity of the Judgment of Forfeiture of this $375,000 home. Worse yet, can it be the law that a Federal Circuit Court is disenabled in correcting and nullifying one of its own decisions when the issue is

raised in a much later litigated case where the consequences to refuse correction are an "excessive fine" of $375,000 levied against this petitioner? The Circuit court says it can not reconsider, but cites no authority. See A-3, Appendix A.

Certiorari should be granted to resolve this very elementary and highly consequential issue on inability to challenge the clear error of a non-published federal memorandum.

The error in the Quick memorandum, placing Quick on "parole," is that there is no such thing in California Law that provides a "parole" for the "unserved portion" of a state prison sentence, because California law requires a California sentence to be *fully served* before release.

See Appendix C to this petition.

CONCLUSION

To resolve the serious 4th Amendment issues of standing of a domestic home owner to object to illegal entries and warrantless seizures and searches in that home, in a federal forfeiture case, within the meaning of *Rakas v. Illinois,* (1978) 439 U.S. 128, and to resolve the nationally consequential issue whether the excessive fine-proportionality case of *Austin v. United States,* 509 U.S. ___, 125 L.Ed.2d 488, 113 S.Ct. 2801 (6-28-93) shall be retroactively applied to all judgments of forfeiture not final on June 28, 1993, Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully Submitted,

/s/ Roger S. Hanson
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Supreme Court of the
United States

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL P. MARVICH, Claimant-Appellant. REAL PROPERTY LOCATED AT 2695 Canary Drive, Costa Mesa, California, Defendant.	No. 91-56448 D.C. No. CV-90-1305-AWT **MEMORANDUM*** (Filed April 13, 1993)

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Submitted April 9, 1993**
Pasadena, California

Before: HALL, WIGGINS and TROTT, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously agrees that this case is appropriate for submission without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Claimant Michael Marvich appeals the district court's judgment of civil forfeiture pursuant to 21 U.S.C. § 881(a)(7) in favor of the United States. The district court found that the defendant real property, Marvich's home, was used, or intended to be used, to facilitate the transportation, sale, receipt, possession or concealment of controlled substances in violation of Title 21 U.S.C., subchapter I, and that Marvich knew of such use.

The district court's judgment followed a non-jury trial at which direct testimony was taken by witness declarations, and at which all witnesses were cross-examined and examined on re-direct. Prior to trial, Marvich moved to suppress evidence found at the defendant property based upon alleged Fourth Amendment violations; Marvich's motion was heard concurrently with the trial and later denied. After trial, Marvich filed objections to the court's findings of fact and conclusions of law, and moved for a new trial. The district court overruled Marvich's objections and denied his motion, finding both "meritless." We affirm the district court's judgment of forfeiture.

I.

Marvich's primary contention is all of the evidence on which the forfeiture is based is the fruit of an illegal entry into and search of the defendant property pursuant to a warrant to arrest Collin Lee Quick. Marvich argues that the arrest warrant for Quick as a "parolee at large" was invalid because Quick was not on "parole" as defined by California law, and also argues that a Ninth

Circuit panel in *United States v. Quick*, No. 88-5166, erroneously found that Quick was a parolee.

To the extent Marvich contests the validity of Quick's arrest warrant and actual arrest, we find that he has no standing. Marvich can not complain of violations of Quick's Fourth Amendment rights. *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (Fourth Amendment rights are personal and may not be asserted vicariously; only defendants whose own Fourth Amendment rights have been violated may benefit from the exclusionary rule); *United States v. Robertson*, 833 F.2d 777, 779 (9th Cir. 1987). Thus, we have no jurisdiction to decide whether Quick's arrest warrant was valid, nor whether this court in *United States v. Quick* erred in finding that Quick was on parole (not to mention that we have no authority to review the decision of another Ninth Circuit panel.)

Marvich also argues that the entry into his home to execute Quick's arrest warrant was illegal because it was based on the putatively invalid arrest warrant. As stated above, Marvich has no standing to challenge Quick's arrest. Taking Quick's arrest warrant therefore as valid, we conclude that the arresting officers were entitled to enter the defendant property to arrest Quick. Because Quick resided at the defendant property,[1] it was lawful

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[1] Despite Marvich's assertion in this appeal that Quick was only a temporary house guest, the evidence adduced at trial clearly demonstrates that Quick resided at the defendant property. Marvich himself acknowledged on cross-examination that Quick rented rooms in the house for about one year. R.T. 9/6/91 at pages 97-99. Furthermore, during surveillance of the defendant property during January 22-25, 1990, customs agents

for officers to enter the property to arrest Quick, and their entry does not violate any expectation of privacy on the part of Marvich. *Robertson,* 833 F.2d at 780. Marvich can not argue that the entry and ensuing search are tainted without asserting Quick's Fourth Amendment rights, which we have explained he may not do. *See id.* at 779 ("Even when officers make a blatantly pretextual arrest of one defendant that creates exigent circumstances justifying search of a second defendant's house, the second defendant may not challenge the legality of the arrest."); *United States v. Chase,* 692 F.2d 69, 70 (9th Cir. 1982) (evidence gathered in a warrantless search of defendant's house as a consequence of an allegedly illegal detention of another person could potentially be suppressed by that person but not by defendant).

II.

In his post-trial objections to the district court's proposed judgment and motion for a new trial, Marvich raised the argument, which he also presses in this appeal, that because Quick was only a house guest the entry into Marvich's home to arrest Quick violated the rule of *Steagald v. United States,* 451 U.S. 204 (1981). Marvich also argues that after officers arrested Quick in the living room of the house, they illegally searched through the remainder of the dwelling, and thereby observed evidence on which a subsequent search warrant was based.

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observed Quick entering and exiting the house freely without knocking.

Both of these arguments relate to Marvich's general contention that the district court should have suppressed all of the evidence seized from his home. Marvich raised neither of these arguments in his pre-trial motion to suppress and offers no explanation for why he did not do so. We therefore will not consider these arguments on appeal. *United States v. Restrepo-Rua*, 815 F.2d 1327, 1329 (9th Cir. 1987) ("Just as a failure to file a timely motion to suppress evidence constitutes a waiver, so too does a failure to raise a particular ground in support of a motion to suppress.")

III.

Finally, Marvich contends that government witnesses Rudisill and Thayer committed perjury, and that the judgment of forfeiture therefore can not stand. To support this contention, Marvich points to alleged inconsistencies between these witnesses' testimony at trial and statements they made or that were attributed to them in the affidavit in support of the search warrant for Marvich's house and the police report of the arrests and searches there on January 25, 1990.

Marvich's counsel thoroughly cross-examined both witnesses at trial regarding the inconsistencies, and addressed the inconsistencies in closing argument as well. After considering all the testimony and other evidence presented at trial, the district court then made findings which it explicitly noted were "based largely on credibility determinations." Order on Objection to Findings and Motion for New Trial at 2. Marvich now makes

no claim of circumstances that were not before the fact-finder, thus we conclude that his assertions of perjury provide no basis for us to reverse the district court's judgment. *Nicholson v. Rushen*, 767 F.2d 1426, 1427 (9th Cir. 1985) (where appellant did not claim circumstances not before the jury his assertions of witness perjury do not entitle him to a new trial; credibility of witnesses is an issue for the jury and is not subject to appellate review).

The decision of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL P. MARVICH, Claimant-Appellant. REAL PROPERTY LOCATED AT 2695 Canary Drive, Costa Mesa, California, Defendant.	No. 91-56448 D.C. No. CV-90-1305-AWT ORDER (Filed June 24, 1993)

Before: HALL, WIGGINS and TROTT, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant vs. COLLIN LEE QUICK, Defendant-Appellee.	No. 88-5166 D.C. No. CR-87-976-JMI MEMORANDUM* (Filed Dec. 12, 1989)

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Argued & Submitted: May 2, 1989
Pasadena, California

Before: FLETCHER, NELSON, and NORRIS, Circuit Judges.

The United States appeals from the dismissal of the indictment against Collin Lee Quick for lack of evidence. Quick was indicted by a federal grand jury on three counts of weapons violations, three counts of narcotics violations and one count of possession of an implement for making false documents. All of the counts are based upon evidence obtained through a parole search of Quick's residence. Quick moved to suppress the evidence

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

claiming that his sentence of parole was invalid and, therefore, that the parole search was invalid. The district court granted defendant's motion to suppress on the ground that Quick's parole was invalid due to the sentencing judge's failure to mention the parole in violation of Cal. Pen. Code § 1170(c).

We agree with the district court that a sentence of parole *in addition* to the defendant's sentence of incarceration would have been invalid. However, since defendant's parole was the result of his early release from prison and was within the three year period of his original sentence, it was a valid parole. Therefore, we remand to the district court to determine whether the parole search that yielded the evidence was based on reasonable suspicion.

DISCUSSION

A. A sentence of parole in addition to Appellee's original sentence of three years incarceration is invalid.

California Penal Code § 1170(c) provides that at the time of sentencing, the court "shall . . . inform the defendant that as part of the sentence after expiration of the term he or she may be on parole for a period." The judge who sentenced Quick in 1983 did not inform him that he would be sentenced to a parole term in addition to his three-year sentence. In fact, the judge stated that the possibility of parole in addition to the sentence had absolutely no application to anything in the world." C.R. 21, Ex. D, at 97. Any sentence of parole added on to the

sentence of three years is therefore invalid under California law.

B. The invalidity of the additional sentence of parole did not result in prejudice since appellee was under the sentence of an alternative, valid parole.

The trial court had no obligation to advise Quick of a parole term *beyond* his three year sentence if the court did not intend to place him on parole, but rather intended his sentence to end at the conclusion of three years incarceration. Parole following the three years without notice to the defendant would be illegal, but that is not the issue in this case. A prisoner cannot complain of early release accompanied by parole in lieu of completion of a lawful sentence of incarceration.

Although Quick may not have been willing to agree to plead guilty in return for a three year prison sentence plus a sentence of parole, the record is clear that he was willing to agree to a full three year prison term. Accordingly, Quick suffers no prejudice if, instead of keeping him in prison for three years, the state releases him early by putting him on parole for the remainder of his three year term. He cannot maintain that he would have agreed to plead guilty in exchange for a full three year sentence, but that he would not have done so for a sentence of 18 months in prison and 18 months on parole. If the sentence does *not* exceed the promised sentence, it is enforceable. *Cf. Carter,* 806 F.2d at 1377 n.4.

The record does not state precisely why Quick was released on parole. If he was released on "good time"

under Cal. Pen. Code § 2931 he would have been subject to a sentence of parole under Cal. Pen. Code § 3000(a). Thus, even under an "automatic release," Quick would still be subject to parole. If he was released for some other reason, such as prison overcrowding, his remaining sentence of incarceration would have been converted into a sentence of parole. There was therefore a valid reason for placing Quick on parole as long as that sentence of parole did not exceed his sentence of three years.

Quick began serving his sentence of incarceration on June 21, 1985. He was paroled on December 8, 1986 after serving 18 months of his sentence. The search of his residence was conducted on November 5, 1987. Thus the search was conducted within the three years of Quick's sentence. Since Quick's parole was valid until the end of that three year period, the search was a parole search.

CONCLUSION

Since Quick was validly on parole, the search of his residence was valid if there was reasonable suspicion to justify the search. *Griffin v. Wisconsin*, 107 S. Ct. 3164 (1987); *Latta v. Fitzharris*, 521 F.2d 246, 249-52 (9th Cir. 1975), *cert. denied*, 423 U.S. 897 (1975).

We therefore REVERSE the decision of the district court and REMAND the case for an evidentiary hearing to determine whether there was reasonable suspicion justifying the parole search.

Supreme Court, U.S.
FILED
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(2)

No. 93-387

In the Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL P. MARVICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the entry of premises that petitioner rented to Collin Quick, to execute an arrest warrant issued after Quick absconded from parole supervision, violated petitioner's Fourth Amendment rights.

2. Whether the district court was clearly erroneous in crediting the testimony of officers who testified in the civil forfeiture proceeding.

3. Whether petitioner is entitled to claim, for the first time in this Court, that the forfeiture was an excessive fine under the Eighth Amendment.

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In the Supreme Court of the United States

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No. 93-387

MICHAEL P. MARVICH, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is unpublished, but the judgment is noted at 990 F.2d 1263 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1993. A petition for rehearing was denied on June 24, 1993. Pet. App. B1. The petition for a writ of certiorari was filed on September 9, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial, the United States District Court for the Central District of California ordered the property at 2695 Canary Drive in Costa Mesa, California, forfeited to the United States pursuant to 21 U.S.C. 881(a)(7). Petitioner, the claimant to that property, appealed that civil judgment of forfeiture. The court of appeals affirmed. Pet. App. A1-A6.

1. In January 1990, federal agents conducting a narcotics investigation learned that Collin Quick was living at 2695 Canary Drive in Costa Mesa, California. A state parole arrest warrant had been issued because Quick had absconded from parole supervision and thus was considered a "parolee-at-large." After the federal agents contacted the California Department of Corrections, Special Parole Agent Brenda Lucas joined the investigation. At Lucas's request, agents surveilled the Canary Drive residence from January 22 through 25, 1990, during which time they saw Quick freely enter and exit on a daily basis without knocking. Gov't C.A. Br. 3-4.

On January 25, 1990, at about 7:20 p.m., Agent Lucas and the others entered the Canary Drive residence to execute the arrest warrant and conduct a parole search of Quick's living areas. Quick and petitioner were found in the living room, where they were detained while agents went through the house to locate additional persons and initiate the parole search. Investigator Larry Thayer, after smelling marijuana inside a first floor bedroom, opened the closet door and discovered a green trash bag containing a large quantity of marijuana. He reported his observations to Officer Rudisill. Rudisill then obtained a state search warrant, which the agents executed at about 11:45 p.m. Gov't C.A. Br. 4-5.

The agents ultimately found more than 20 pounds of marijuana, more than three kilograms of metham-

phetamine, two grams of cocaine, and various items of drug paraphernalia. The drugs and paraphernalia were scattered throughout the residence. For example, large quantities of marijuana were found in a downstairs room (also containing papers addressed to petitioner), in an enclosed patio, and throughout the attic (including in a cardboard box addressed to petitioner). Pet. C.A. Excerpts of Record (E.R.) 27-29 (district court's findings of fact).

2. The United States subsequently filed a civil action seeking forfeiture of the Canary Drive property, pursuant to 21 U.S.C. 881(a)(7), as "property [that] was used to store, conceal and distribute marijuana, methamphetamine and cocaine." E.R. 10-14 (Verified Complaint). Petitioner, in turn, filed a verified claim to the property and an answer to the complaint. *Id.* at 15-18, 19-25. In both pleadings he contended that the parole warrant used to justify the entry of the premises was illegal because "Collin Lee Quick was not validly on parole." *Id.* at 16, 21. Petitioner subsequently moved to suppress the evidence seized from the Canary Drive residence, renewing his contention that Quick had never validly been on parole and further claiming that the arrest warrant for Quick was based on the fruits of an unlawful search in 1987 of Quick's prior residence. See *id.* at 45-51. The hearing on petitioner's motion was consolidated with the trial. Pet. App. A2.

3. After a bench trial, the district court denied petitioner's motion to suppress and entered an order of forfeiture. Pet. App. A2. The court held that petitioner "has no standing to challenge the validity of Quick's warrant or [Quick's] arrest." E.R. 37 (Supplemental Memorandum). Additionally, the court held that "[e]ven if [the search] warrant (and the arrest warrant) were invalid, here the *Leon* exception applies: the officers acted in objective good faith in their actions." *Ibid.* (citing

United States v. *Hunt*, 893 F.2d 1028, 1032 (9th Cir. 1990), cert. denied, 112 S. Ct. 107 (1991), which had applied the principles of *United States* v. *Leon*, 468 U.S. 897 (1984), to an arrest warrant). See also E.R. 9 (reaffirming holding in order denying new trial).

On the merits, the district court found that the Canary Drive property was used to facilitate drug crimes, that petitioner "failed to exercise due care to prevent the illegal use of the defendant real property, was willfully blind, and consented to the illegal use of the property," and that petitioner himself "used the defendant real property to facilitate the transportation, sale, receipt, possession or concealment of a controlled substance" in violation of law. E.R. 29-30. Accordingly, the court held that petitioner had not carried his burden of proving that he was an "innocent owner." *Id.* at 33. In that regard, the court noted that "[s]hortly before the seizure of the drugs, paraphernalia and associated drug-dealer's evidence, [petitioner] was tape recorded discussing a drug transaction with an undercover informant." *Id.* at 37 (Supplemental Memorandum). The court concluded that petitioner "has proved himself far from 'innocent' in this area" and that, "[g]iven his own involvement in drug transactions, or attempts at the same, his testimony that he knew nothing about what was going on in his own home is not entitled to any credibility." *Id.* at 37-38.

The district court subsequently denied, as "meritless," petitioner's motion for a new trial. E.R. 8-9. The court explained that, "[f]or the most part, [petitioner] quarrels with the court's findings of fact, which were based largely on credibility determinations." *Id.* at 9. Accordingly, the court entered a judgment forfeiting the Canary Drive property to the United States. *Id.* at 5-7.

4. The court of appeals affirmed. Pet. App. A1-A6. It first rejected petitioner's Fourth Amendment challenge.

Citing its prior unpublished opinion in *United States* v. *Quick*, No. 88-5166 (9th Cir. Dec. 12, 1989) (*reprinted at* Pet. App. C1-C4), the court refused to consider petitioner's contention that Quick had never validly been placed on parole under California law. Pet. App. A2-A3. The court explained that, "[t]o the extent [petitioner] contests the validity of Quick's arrest warrant and actual arrest, we find that he has no standing." *Id.* at A3 (citing *Rakas* v. *Illinois*, 439 U.S. 128, 133-134 (1978), and *United States* v. *Robertson*, 833 F.2d 777, 779 (9th Cir. 1987)).

The court, "[t]aking Quick's arrest warrant therefore as valid," then concluded that "the arresting officers were entitled to enter the defendant property to arrest Quick." Pet. App. A3. The court rejected petitioner's assertion that Quick was merely "a temporary house guest," explaining that "the evidence adduced at trial clearly demonstrates that Quick resided at the defendant property." *Ibid.* n.1 (noting officers' surveillance and fact that petitioner "himself acknowledged on cross-examination that Quick rented rooms in the house for about one year"). Accordingly, "[b]ecause Quick resided at the defendant property, it was lawful for officers to enter the property to arrest Quick, and their entry does not violate any expectation of privacy on the part of" petitioner. *Id.* at A3-A4. The court refused to consider petitioner's additional challenges to the scope of the search, explaining that petitioner had not "raised * * * these arguments in his pre-trial motion to suppress and offers no explanation for why he did not do so." *Id.* at A4-A5 (citing *United States* v. *Restrepo-Rua*, 815 F.2d 1327, 1329 (9th Cir. 1987)).

Finally, the court of appeals rejected petitioner's contention that the forfeiture judgment could not stand because two government agents had committed perjury by giving trial testimony allegedly inconsistent with their

prior statements. Pet. App. A5-A6. The court noted that petitioner's counsel "thoroughly cross-examined both witnesses at trial regarding the inconsistencies" and that "the district court then made findings which it explicitly noted were 'based largely on credibility determinations.'" *Id.* at A5 (quoting district court's order denying new trial). The court rejected petitioner's claim of perjury because petitioner pointed to no "circumstances that were not before the fact-finder." *Id.* at A5-A6.

ARGUMENT

1. Petitioner renews his claim (Pet. 8-15, 20-22) that the entry of his home to execute a state parole arrest warrant against Collin Quick was illegal because Quick was never validly on parole. Even if the arrest warrant was invalid, however, the officers were entitled to rely in objective good faith upon its validity. See generally *United States* v. *Leon*, 468 U.S. 897 (1984).

Petitioner was of course entitled to challenge the entry and search of his residence based on the arrest warrant. The court of appeals correctly held, however, that petitioner had not timely raised such challenges in the district court. Pet. App. A4-A5; see generally Fed. R. Crim. P. 12(b)(3) (motions to suppress must be raised prior to trial) and 12(f) (untimely motions are waived). Nor was it plain error not to invalidate the entry and search of petitioner's residence. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 113 S. Ct. 1770 (1993). The arrest warrant for Quick justified entry of the home where Quick was residing. See *Payton* v. *New York*, 445 U.S. 573, 602-603 (1980). Petitioner's belated reliance on *Steagald* v. *United States*, 451 U.S. 204 (1981), which generally requires a search warrant to enter the residence of a "third party" to execute an arrest warrant (*id.* at 205), is misplaced given that "the evidence adduced at

trial clearly demonstrates that Quick resided at the defendant property." Pet. App. A3 n.1.

Nor did the court of appeals commit plain error in failing to entertain a challenge to the conduct of a limited search before the officers obtained the search warrant. While petitioner did not preserve that challenge for review, the actions leading to the initial discovery of marijuana were justified both as a valid protective sweep of the premises (*Maryland* v. *Buie*, 494 U.S. 325 (1990)), and as a valid parole search of Quick's living quarters (*Griffin* v. *Wisconsin*, 483 U.S. 868 (1987)).

2. Petitioner next claims (Pet. 15-17) that the forfeiture order cannot stand because the district court allowed the presentation of "perjured testimony." As the district court suggested in denying petitioner's motion for a new trial as "meritless" (E.R. 9), petitioner's claim is but a thinly disguised attack on the district court's credibility findings.[1] There is no basis for further review.

3. Finally, petitioner argues (Pet. 18-19), for the first time in this Court, that forfeiture of his residence violated the Excessive Fines Clause of the Eighth Amendment because it was disproportionate to his wrongdoing. In support of his position, petitioner relies upon *Austin*

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[1] Petitioner's claim is apparently based on Officer Larry Thayer's sworn declaration (E.R. 63), which he reaffirmed on cross-examination (see 2 R.T. 158-159), that he could "smell the strong odor of marijuana" even before opening the door to a downstairs room. Petitioner claimed that those sworn statements were inconsistent with fellow Officer Rudisill's search warrant affidavit reporting that Thayer had told him that "[w]hile in this bedroom he could smell a heavy odor of [m]arijuana" (E.R. 68). The alleged inconsistencies were fully aired at trial. The district court credited Officer Thayer's sworn testimony when it found that "[t]here was a strong odor of marijuana that permeated, at a minimum, the downstairs room and hallway of defendant real property." E.R. 29.

v. *United States*, 113 S. Ct. 2801 (1993), which held that the Excessive Fines Clause applies to forfeitures under the Controlled Substances Act and which petitioner claims should be accorded "full retroactivity." We agree that *Austin* would apply to cases that were not yet final (*i.e.*, cases in which the time to petition for certiorari had not yet expired) at the time it was decided. See *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6, 328 (1987). Petitioner's reliance on *Austin* fails, however, not because of any principle of retroactivity but rather because petitioner waived the claim he now seeks to raise. Petitioner never before claimed that—and the courts below never considered whether—the forfeiture was excessive or disproportionate to petitioner's wrongdoing. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 112 S. Ct. 1735, 1738 (1992) (internal quotation marks omitted).

There is nothing exceptional about this case that would justify abandoning this Court's traditional rule against considering issues neither raised nor considered in the lower courts. Petitioner's only explanation for his default is that "the law was otherwise when his trial and appeal occurred, i.e., the authority of *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)" (Pet. 19). But *Calero-Toledo* involved the scope of an innocent owner defense—not the interpretation of the Excessive Fines Clause. While at least one court deemed the reasoning of *Calero-Toledo* inconsistent with any claim that the Eighth Amendment requires proportionality review (see *Austin*, 113 S. Ct. at 2803, discussing lower court opinion), this Court, without purporting to overrule *Calero-Toledo*, disagreed. See *Austin*, 113 S. Ct. at 2810. Therefore, it cannot fairly be said that the Court in *Austin* overruled a prior decision that otherwise pre-

cluded petitioner's claim. Cf. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 320-321 & n.6 (1971).[2]

Finally, it cannot be said that the forfeiture in this case amounted to plain error under *Austin*. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 113 S. Ct. 1770 (1993). While the *Austin* Court did not decide the specific standards that should govern proportionality review (see 113 S. Ct. at 2812 & n.15), the forfeiture here was not disproportionate, and certainly was not plainly disproportionate, under any conceivable standard. For example, Justice Scalia has suggested that the sole inquiry should be "whether the confiscated property has a close enough relationship to the offense." *Austin*, 113 S. Ct. at 2815 (concurring in part and concurring in the judgment; emphasis omitted). Here, where large quantities of illegal drugs and drug paraphernalia were found throughout the house, on the patio, and in the attic, the answer clearly is in the affirmative. Moreover, assuming some monetary standard had to be satisfied, the street value of the drugs seized from the house—including some $23,000 worth of marijuana and some $70,000 worth of methamphetamine (see E.R. 56)[3]—was sufficient to support for-

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[2] Although petitioner does not mention it, a Ninth Circuit decision had held that the Eighth Amendment did not require proportionality review in a civil forfeiture action. See *United States* v. *Tax Lot 1500*, 861 F.2d 232, 233-235 (1988), cert. denied, 493 U.S. 954 (1989). The Ninth Circuit, however, appeared to leave open the possibility of exercising "judicial restraint" to limit the scope of forfeiture in certain cases. *Id.* at 235. Thus, petitioner cannot claim, even under then-prevailing Ninth Circuit law, that he was precluded from urging the courts below to apply proportionality analysis.

[3] Officer Rudisill indicated that some 23 pounds of marijuana and 3,167 grams of methamphetamine (*i.e.*, almost seven pounds) had been found throughout the house. He explained that the price of marijuana on the date of the search was about $1,000 per pound

feiture. Accordingly, there is no basis for initial review in this Court of petitioner's defaulted Eighth Amendment claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and that the price of methamphetamine was about $10,000 per pound. See E.R. 56.